

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF CALIFORNIA

3 SAN JOSE DIVISION

4
5 ADAPTIX, INC.,) C-13-01776 PSG
6) AND RELATED CASES
7 PLAINTIFF,)
VS.) SAN JOSE, CALIFORNIA
8) AUGUST 7, 2014
9 APPLE, INC., ET AL,)
DEFENDANTS.) PAGES 1-29
10 _____)
11 AND RELATED CASES.)
12 _____)

13 TRANSCRIPT OF PROCEEDINGS
14 BEFORE THE HONORABLE PAUL S. GREWAL
UNITED STATES MAGISTRATE JUDGE

15 A P P E A R A N C E S:

16 FOR PLAINTIFF BANYS, P.C.
17 ADAPTIX: BY: RICHARD CHENG-HONG LIN
1032 ELWELL COURT, SUITE 100
PALO ALTO, CALIFORNIA 94303

18 HAYES, MESSINA, GILMAN & HAYES
19 BY: JAMES J. FOSTER (BY PHONE)
MICHAEL J. ERCOLINI (BY PHONE)
20 200 STATE STREET, 6TH FLOOR
BOSTON, MASSACHUSETTS 02109

21 APPEARANCES CONTINUED ON NEXT PAGE

23 OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

25 PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

1
2 APPEARANCES (CONTINUED)

3
4 FOR DEFENDANT WILMER, CUTLER, PICKERING,
5 APPLE: HALE AND DORR
BY: MARK D. SELWYN
CRAIG E. DAVIS
950 PAGE MILL ROAD
PALO ALTO, CALIFORNIA 94304

6
7 BY: JONATHAN L. HARDT (BY PHONE)
8 1875 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006

9
10 FOR DEFENDANT WILMER, CUTLER, PICKERING,
11 VERIZON: HALE AND DORR
BY: GEOFFREY M. GODFREY
MARK D. FLANAGAN
950 PAGE MILL ROAD
PALO ALTO, CALIFORNIA 94304

12
13 FOR DEFENDANT AKIN, GUMP, STRAUSS, HAUER & FELD
14 AT&T AND HTC: BY: FRED I. WILLIAMS
300 WEST 6TH STREET, SUITE 1900
AUSTIN, TEXAS 78701

15
16 FOR DEFENDANT CADWALADER, WICKERSHAM & TAFT
17 AT&T MOBILITY: BY: CHRISTOPHER A. HUGHES (BY PHONE)
1 WORLD FINANCIAL CENTER
18 NEW YORK, NEW YORK 10281

19
20 FOR DEFENDANT BAKER BOTTS
21 T-MOBILE: BY: DOUGLAS M. KUBEHL
2001 ROSS AVENUE
DALLAS, TEXAS 75201

1 SAN JOSE, CALIFORNIA

AUGUST 7, 2014

2 P R O C E E D I N G S

3 (COURT CONVENED AT 10:24 A.M.)

4 THE COURT: MR. RIVERA, WOULD YOU CALL THE NEXT CASE,
5 PLEASE?

6 THE CLERK: YES, YOUR HONOR.

7 CALLING ADAPTIX, INC., VERSUS APPLE, INC., ET AL, CASE
8 NUMBER CV-13-1776 PSG, AND RELATED CASES, MATTER ON FOR
9 DEFENDANTS' MOTION TO STRIKE PORTIONS OF DR. MICHAEL
10 CALOYANNIDES'S EXPERT REPORTS.

11 COUNSEL, PLEASE STATE YOUR APPEARANCES.

12 MR. LIN: GOOD MORNING, YOUR HONOR. RICHARD LIN
13 APPEARING ON BEHALF OF ADAPTIX.

14 THE COURT: MR. LIN, GOOD MORNING. WELCOME.

15 MR. SELWYN: GOOD MORNING, YOUR HONOR. MARK SELWYN
16 AND CRAIG DAVIS FROM WILMER, HALE ON BEHALF OF APPLE.

17 MR. GODFREY: GOOD MORNING, YOUR HONOR.

18 GEOFF GODFREY AND MARK FLANAGAN ON BEHALF OF VERIZON.

19 THE COURT: GOOD MORNING TO EACH OF YOU.

20 MR. WILLIAMS: GOOD MORNING, YOUR HONOR.

21 FRED WILLIAMS FOR HTC AND AT&T.

22 THE COURT: MR. WILLIAMS, GOOD MORNING.

23 AND ON THE TELEPHONE, I UNDERSTAND WE HAVE A NUMBER OF
24 ATTORNEYS AS WELL. WOULD YOU LIKE TO STATE YOUR APPEARANCES,
25 PLEASE?

1 MR. FOSTER: YES. FOR PLAINTIFF, JAMES FOSTER.

2 THE COURT: MR. FOSTER, GOOD MORNING.

3 IS MR. ERCOLINI ALSO ON THE LINE?

4 MR. ERCOLINI: YES, I AM PRESENT.

5 THE COURT: ALL RIGHT. GOOD MORNING TO YOU, SIR.

6 MR. HUGHES, MR. HARDT, I UNDERSTAND YOU'RE ALSO ON THE
7 LINE. IS THAT CORRECT?

8 MR. HUGHES: YES, YOUR HONOR. CHRISTOPHER HUGHES
9 FROM CADWALADER IN NEW YORK FOR AT&T ON THE LINE. GOOD
10 MORNING.

11 THE COURT: GOOD MORNING.

12 MR. HARDT, ARE YOU THERE AS WELL?

13 MR. HARDT: YES, YOUR HONOR. GOOD MORNING.

14 THE COURT: GOOD MORNING.

15 AND MR. KUBEHL, I UNDERSTAND YOU'RE ALSO JOINING US. AM I
16 RIGHT?

17 MR. KUBEHL: YES, YOUR HONOR. GOOD MORNING.

18 THE COURT: GOOD MORNING. WELCOME.

19 ALL RIGHT. WELL, I HAVE RECEIVED AND REVIEWED YOUR
20 SUBMISSIONS IN THE VARIOUS CASES THAT HAVE BEEN NOTED AS
21 PRESENTED TO ME HERE THIS MORNING.

22 I UNDERSTAND WE HAVE A MOTION TO STRIKE BROUGHT BY THE
23 DEFENDANTS, AND AM I RIGHT IN UNDERSTANDING THAT EACH OF THE
24 DEFENDANTS WHO HAS APPEARED IS JOINING IN THIS MOTION AND WE
25 HAVE ONE COMMON MOTION TO RESOLVE?

1 MR. SELWYN: THAT'S CORRECT, YOUR HONOR.

2 THE COURT: OKAY. TERRIFIC.

3 ALL RIGHT. WELL, THIS IS A MOTION BROUGHT BY THE
4 DEFENDANTS, SO I'LL START WITH WHOMEVER WANTS TO SPEAK TO THIS
5 ISSUE.

6 MR. SELWYN, YOU'RE STANDING, SO I'M ASSUMING THAT'S YOU.

7 MR. SELWYN: GOOD MORNING, YOUR HONOR.

8 THE COURT: GOOD MORNING.

9 MR. SELWYN: YOUR HONOR, YOU HAD PREVIOUSLY FRAMED
10 THE LEGAL QUESTION FOR THIS TYPE OF MOTION AS FOLLOWS: HAS THE
11 EXPERT PERMISSIVELY SPECIFIED THE APPLICATION OF A DISCLOSED
12 THEORY OR HAS THE EXPERT IMPERMISSIBLY SUBSTITUTED A NEW THEORY
13 ALTOGETHER?

14 THE COURT: THAT SOUNDS LIKE SOMETHING I WOULD SAY.

15 GO AHEAD, MR. SELWYN.

16 MR. SELWYN: AND IN THIS CASE IT APPEARS, BASED ON
17 ADAPTIX'S LETTER BRIEF, THAT THERE'S NO DISPUTE TO THE ANSWER
18 TO THAT QUESTION. ADAPTIX CONCEDES THAT MODE 2 WAS THE ONLY
19 DISCLOSED INFRINGEMENT THEORY FOR EVERY ONE OF THE ASSERTED
20 APPARATUS CLAIMS AND THAT IT NEVER DISCLOSED ANY THEORY
21 RELATING TO MODE 3 FOR THESE CLAIMS, MUCH LESS THE NEW MODE 3
22 THEORY ON WHICH ITS EXPERT NOW PROCEEDS.

23 THE COURT: MR. SELWYN, MAY I JUST INTERRUPT YOU AND
24 ASK, I TAKE IT THERE'S NO DISPUTE MODE 1 IS OUT? WE'RE NOT
25 TALKING ABOUT MODE 1, AND BOTH SIDES AGREE WITH THAT?

1 MR. SELWYN: YES, THAT'S CORRECT.

2 THE COURT: OKAY. GO AHEAD.

3 MR. SELWYN: IN ADDITION, ADAPTIX CONCEDES IN ITS
4 BRIEF THAT THE MODE 3 THEORY ON WHICH ITS EXPERT NOW PROCEEDS
5 CANNOT BE FOUND ANYWHERE IN ITS INFRINGEMENT CONTENTIONS.

6 SO THIS IS A CASE WHERE THERE'S NO DISPUTE THAT THE
7 CHALLENGE TO THE INFRINGEMENT THEORIES ARE NEW, THEY'RE MAKING
8 THEIR APPEARANCE FOR THE FIRST TIME IN THE EXPERT REPORT, AND
9 THE EXPERT IS NOT MERELY APPLYING A THEORY DISCLOSED IN THE
10 INFRINGEMENT CONTENTIONS.

11 THE COURT: MR. SELWYN, AM I CORRECT IN UNDERSTANDING
12 THAT YOU ARE NOT CHALLENGING THE EXPERT'S THEORIES AS TO THE
13 METHOD CLAIMS IN MODE 3? IS IT FAIR TO SAY THAT THOSE THEORIES
14 WERE DISCLOSED IN CONTENTIONS, AND WHILE YOU DISPUTE THE
15 SUBSTANCE OF THEM, YOU'RE NOT HERE TO STRIKE THEM?

16 MR. SELWYN: NO, WE ARE. WE ARE DISPUTING THE NEW
17 ASPECT, THE NEW THEORY OF MODE 3 THAT'S BEING ADVANCED FOR
18 THOSE CLAIMS.

19 THE COURT: FAIR ENOUGH. WOULD YOU AT LEAST AGREE
20 THAT THE CONTENTIONS DID DISCLOSE SOME THEORY REGARDING MODE 3
21 AND THE METHOD CLAIMS?

22 MR. SELWYN: WITH RESPECT TO THE METHOD CLAIMS,
23 THAT'S CORRECT --

24 THE COURT: OKAY.

25 MR. SELWYN: -- THE VERY DIFFERENT THEORY THAT THE

1 EXPERT NOW PROCEEDS ON.

2 THE EXPERT HAS ABANDONED THE THEORY THAT'S IN THE
3 INFRINGEMENT CONTENTIONS WITH RESPECT TO THE METHOD CLAIMS FOR
4 MODE 3.

5 THE COURT: OKAY. GO AHEAD.

6 MR. SELWYN: SO ALL OF THE CASE LAW, INCLUDING THE
7 CASE LAW CITED BY ADAPTIX, SAYS THAT UNDER THESE CIRCUMSTANCES
8 WHERE THE THEORIES ARE INDISPUTABLY NEW OR THEY'RE MAKING THEIR
9 APPEARANCE FOR THE FIRST TIME IN THE EXPERT REPORT, AS A MATTER
10 OF UPHOLDING THE PATENT LOCAL RULES, THE NEW THEORY SHOULD BE
11 STRUCK.

12 HAVING ADMITTED THAT THE THEORIES ARE NEW, ADAPTIX DEVOTES
13 ITS LETTER BRIEF TO TRYING TO JUSTIFY WHY ITS EXPERTS SHOULD,
14 NOTWITHSTANDING THE PATENT LOCAL RULES AND NOTWITHSTANDING THE
15 LATE STAGE OF THIS CASE, BE ALLOWED TO ASSERT NEW THEORIES.

16 FIRST, ADAPTIX ARGUES THAT THE DEFENDANTS WERE AWARE THAT
17 ADAPTIX ASSERTED INFRINGEMENT OF METHOD CLAIMS BASED ON MODE 3,
18 AND THAT SHOULD SUFFICE.

19 THAT HAS THE LOGIC, RESPECTFULLY, COMPLETELY BACKWARDS.
20 THE PATENT LOCAL RULES REQUIRE CONTENTIONS TO BE MADE ON A
21 CLAIM-BY-CLAIM, LIMITATION-BY-LIMITATION BASIS, AND BECAUSE
22 ADAPTIX ASSERTED MODE 3 ONLY FOR THE METHOD CLAIMS AND NOT FOR
23 THE APPARATUS CLAIMS, THE DEFENDANTS DREW THE ONLY NORMAL AND
24 REASONABLE AND LOGICAL CONCLUSION, NAMELY, THAT MODE 2 AND NOT
25 MODE 3 WAS ASSERTED FOR THE APPARATUS CLAIMS.

1 NEXT, ADAPTIX ARGUES THAT BECAUSE IT DID NOT INCLUDE AN
2 EXPLICIT, QUOTE, "DISCLAIMER" IN ITS INFRINGEMENT CONTENTIONS
3 THAT IT WAS NOT ACCUSING MODE 3 OF INFRINGEMENT OF THE
4 APPARATUS CLAIMS, THE DEFENDANTS SHOULD HAVE UNDERSTOOD THAT IT
5 WAS.

6 AGAIN, WITH RESPECT, IN ADVANCING THAT ARGUMENT, ADAPTIX
7 REALLY THUMBS ITS NOSE AT THE PATENT LOCAL RULES AND TURNS THE
8 PURPOSE OF INFRINGEMENT CONTENTIONS ON THEIR HEAD.

9 THE IDEA THAT A PLAINTIFF COULD PURSUE AN UNDISCLOSED
10 THEORY FOR AN ASSERTED CLAIM, UNLESS IT WAS DISCLAIMED IN THE
11 CONTENTIONS, WOULD FUNDAMENTALLY UNDERMINE THE CRYSTALIZING
12 PURPOSE OF CONTENTIONS. WHAT IT WOULD ALLOW A PLAINTIFF TO DO,
13 AND THAT'S EXACTLY WHAT HAS HAPPENED HERE, IS CREATE THE
14 IMPRESSION THAT THEIR INFRINGEMENT THEORY IS ONE THING, ABANDON
15 THAT, AND PURSUE SOMETHING ELSE FOR THE FIRST TIME IN THE
16 EXPERT REPORT.

17 IT BEARS EMPHASIS HERE THAT DEFENDANTS WERE AGGRESSIVE IN
18 PRESSING ADAPTIX TO DISCLOSE ALL ITS INFRINGEMENT THEORIES FOR
19 EACH ASSERTED CLAIM. THIS IS NOT A CASE WHERE THE DEFENDANTS
20 LAID QUIETLY BEHIND THE PROVERBIAL LOG, AS SOME OF THE CASES
21 SAY.

22 LET ME JUST GIVE YOUR HONOR ONE EXAMPLE. IN JANUARY AFTER
23 THE MARKMAN RULING, THE DEFENDANTS WROTE COLLECTIVELY TO
24 ADAPTIX TO REPEAT CONCERNs THAT WE HAD HAD ABOUT INFRINGEMENT
25 CONTENTIONS AND, AMONG OTHER THINGS, THE LETTER REQUESTED,

1 QUOTE, "THAT ADAPTIX PROMPTLY PROVIDE AMENDED INFRINGEMENT
2 CONTENTIONS NO LATER THAN JANUARY 31ST, 2014, AND SET FORTH IN
3 DETAIL ALL OF ADAPTIX'S INFRINGEMENT THEORIES IN A MANNER THAT
4 ADDRESS THE ABOVE-REFERENCED DEFICIENCIES PREVIOUSLY IDENTIFIED
5 AND APPLY THE COURT'S CONSTRUCTION."

6 AND A WEEK LATER WE RECEIVED AN E-MAIL FROM ADAPTIX SAYING
7 "ADAPTIX AGREES TO YOUR REQUEST AND WILL PROVIDE ITS METHOD
8 INFRINGEMENT CONTENTIONS BY THE 31ST."

9 THE COURT: AND IF I REMEMBER CORRECTLY, MR. SELWYN,
10 MY CLAIM CONSTRUCTION ORDER CAME OUT SOMETHING LIKE DECEMBER,
11 MID-DECEMBER OF LAST YEAR; CORRECT?

12 MR. SELWYN: CORRECT, THE END OF DECEMBER.

13 IN THOSE AMENDED INFRINGEMENT CONTENTIONS FROM THE END OF
14 JANUARY, AGAIN, WHICH FOLLOWED YOUR HONOR'S MARKMAN RULING AND
15 WHICH ADAPTIX AGREED WOULD ACCOUNT FOR THE COURT'S MARKMAN
16 RULING, ADAPTIX DID NOT INCLUDE ANY ASSERTION OF MODE 3 FOR THE
17 APPARATUS CLAIMS.

18 TO THE CONTRARY. WHAT ADAPTIX DID INSTEAD WAS EXPANDED
19 ITS CONTENTIONS FOR MODE 2 FOR THE APPARATUS CLAIMS.

20 SO THE SUGGESTION THAT'S NOW BEING ADVANCED THAT THE
21 DEFENDANTS SHOULD HAVE SOMEHOW KNOWN OR CONCLUDED THAT, IN
22 FACT, MODE 3 WAS ASSERTED FOR THE APPARATUS CLAIMS SIMPLY DOES
23 NOT STAND TO REASON.

24 AS FOR THE SECOND NEW THEORY, ADAPTIX ARGUES THAT A
25 CONSTRUCTION PROPOSED FOR THE "SELECTING" TERM BY DEFENDANTS IN

1 MARKMAN LAST FALL SOMEHOW GAVE RISE TO THE NEED FOR ITS EXPERT
2 NOW TO CHANGE ADAPTIX'S THEORY OF "SELECTION" UNDER MODE 3.

3 THAT DOESN'T MAKE ANY SENSE, EITHER, AND CANNOT EXCUSE
4 ADAPTIX IGNORING THE PATENT LOCAL RULES.

5 THE COURT: MR. SELWYN, CAN YOU JUST WALK ME
6 THROUGH -- AND I'LL OBVIOUSLY GIVE PLAINTIFFS A SIMILAR
7 OPPORTUNITY -- WALK ME THROUGH THE, AS YOU SEE IT, NEW THEORY
8 WITH RESPECT TO THIS TERM AS COMPARED TO THE EARLIER THEORY.

9 MR. SELWYN: CERTAINLY. THE OLD THEORY FOR MODE 3
10 WAS THAT THE U.E., THE HANDSET, CHOSE ALL SUBBANDS AND THAT
11 THAT WAS SATISFYING THE SELECTION TERM.

12 THE NEW THEORY IS THAT THE U.E.S CHOOSE SOME SUBBANDS AS
13 CANDIDATE SUBCARRIERS AND DON'T CHOOSE OTHER SUBBANDS AS
14 CANDIDATES SUBCARRIERS.

15 SO WHEREAS BEFORE THEY HAD SAID THAT THE CHOICE, THE
16 SELECTION OF "ALL" SATISFIES "SELECTING," NOW THEY'RE, FRANKLY,
17 SUBMITTING, PROFFERING A THEORY THAT CONTRADICTS THAT AND
18 SAYING WHAT'S REALLY HAPPENING HERE IS THE SELECTION OF SOME.

19 THE COURT: AND I'M SORRY FOR INTERRUPTING YOU OVER
20 AND OVER AGAIN.

21 AS I UNDERSTAND IT, THE CLAIM CONSTRUCTION I ISSUED BACK
22 IN DECEMBER SIMPLY CONFIRMED, WITH RESPECT TO THIS TERM, THAT
23 "SELECTING" MEANT "CHOOSING;" RIGHT?

24 SO I'M JUST STRUGGLING TO UNDERSTAND WHERE THIS, WHERE
25 THIS CHANGE, AS YOU'VE DESCRIBED IT, COULD BE GROUNDED OR

1 JUSTIFIED BY MY CONSTRUCTION OR MY CHOICE OF ONE CONSTRUCTION
2 VERSUS ANOTHER.

3 MR. SELWYN: IT CAN'T, AND HERE'S WHY: ADAPTIX WON
4 ITS CONSTRUCTION AND DEFENDANTS LOST. THE COURT ADOPTED
5 VERBATIM ADAPTIX'S PROPOSED CONSTRUCTION FOR THE "SELECTING"
6 TERM.

7 THE COURT: I THOUGHT THAT'S WHAT I WAS DOING, BUT I
8 WANTED TO SEE IF YOU HAD A DIFFERENT VIEW OF THAT.

9 MR. SELWYN: NO, NO. YOUR HONOR REJECTED THE
10 CONSTRUCTION THAT THE DEFENDANTS HAD PROPOSED.

11 SO THERE'S ABSOLUTELY NOTHING THAT HAPPENED IN MARKMAN
12 THAT SHOULD HAVE GIVEN RISE TO A NEW THEORY.

13 BUT LET'S JUST ASSUME THAT SOMETHING ACTUALLY DID HAPPEN
14 IN MARKMAN THAT WOULD HAVE GIVEN RISE FOR ADAPTIX TO THINK OF A
15 NEW THEORY.

16 IF THAT'S THE CASE, IT SHOULD HAVE BEEN DISCLOSED LONG,
17 LONG AGO, NOT FOR THE FIRST TIME INDISPUTABLY IN THE EXPERT'S
18 REPORT.

19 AND THIRD, AS I MENTIONED, ADAPTIX DID, IN FACT, SERVE
20 AMENDED CONTENTIONS AFTER MARKMAN IN WHICH IT REPRESENTED THAT
21 IT WAS ACCOUNTING FOR MARKMAN, BUT NEVER INCLUDED THIS NEW
22 THEORY. THAT ALONE SHOULD BE ENOUGH TO SHOW THAT THERE'S NO
23 JUSTIFICATION FOR THIS LATE THEORY.

24 BUT LET ME MAKE ONE OTHER POINT HERE.

25 YOUR HONOR, IN OTHER CASES, HAS NOTED THAT IF THE

1 DEFENDANTS ARE NOT SATISFIED WITH INFRINGEMENT CONTENTIONS, ONE
2 DISCOVERY TOOL AVAILABLE IS TO SERVE SOME INTERROGATORIES, ASK
3 FOR WHATEVER ADDITIONAL DETAIL YOU WANT.

4 SO AS A BELT AND SUSPENDERS APPROACH, THAT'S WHAT WE DID
5 HERE, AND IN OUR FIFTH COMMON INTERROGATORY, WE ASKED ADAPTIX
6 TO IDENTIFY FOR EACH CLAIM LIMITATION WHETHER IT CONTENDED IT
7 WAS ESSENTIAL OR NECESSARY TO THE STANDARD.

8 THE RESPONSE WE GOT BACK WAS, QUOTE, "INFORMATION
9 REGARDING ALL THE REASONS, EVIDENCE, CLAIMS, CONTENTIONS,
10 ANALYSIS, THEORIES OF INFRINGEMENT, SUPPORT, AND IDENTIFICATION
11 OF THE RELEVANT PRODUCTS TO THE VARIOUS DEFENDANTS CAN BE
12 DERIVED OR ASCERTAINED FROM THE AFOREMENTIONED FORTHCOMING
13 AMENDED INFRINGEMENT CONTENTIONS," THE ONES THAT FOLLOWED
14 MARKMAN.

15 THERE'S NO WAY -- THERE'S NO WAY TO RECONCILE THAT
16 SWEEPING REPRESENTATION WITH ADAPTIX'S CURRENT POSITION.

17 FURTHER, WE HONED IN ON MODE 3 IN OUR INTERROGATORIES ONCE
18 IT BECAME CLEAR THAT ADAPTIX WAS PURSUING MODE 3 WITH RESPECT
19 TO THE METHOD CLAIMS, AND ON MARCH 10TH OF THIS YEAR, WE SERVED
20 AN INTERROGATORY SPECIFIC TO MODE 3. THAT INTERROGATORY READ:
21 "IDENTIFY ALL EVIDENCE THAT YOU CONTEND SHOWS THAT THE ACCUSED
22 PRODUCTS, WHEN EMPLOYING APERIODIC MODES 3.0 AND 3.1 'SELECT A
23 SET OF CANDIDATE SUBCARRIERS' AS THAT PHRASE HAS BEEN CONSTRUED
24 BY THE COURT."

25 IN RESPONSE, ON APRIL 14TH ADAPTIX WROTE, "ADAPTIX HAS

1 ALREADY PROVIDED CLAIM CHARTS," ALLEGING -- "SETTING FORTH IN
2 DETAIL AND WITH CITATIONS TO SPECIFIC EVIDENCE, INFRINGEMENT BY
3 DEFENDANTS OF THE PATENTS-IN-SUIT. THOSE CLAIM CHARTS
4 SPECIFICALLY ADDRESS THE COURT'S CONSTRUCTION OF THE 'SELECT A
5 SET OF CANDIDATE SUBCARRIERS' TERM."

6 AGAIN, THERE'S NO WAY TO RECONCILE THAT INTERPRETATION
7 WITH ADAPTIX'S CURRENT POSITION.

8 SO TIME AND AGAIN, ADAPTIX SAID IT HAD TAKEN THE COURT'S
9 CONSTRUCTION INTO ACCOUNT AND PROVIDED CLAIM CHARTS SETTING
10 FORTH ALL THE THEORIES AND ALL THE SPECIFIC EVIDENCE.

11 LET ME TURN NOW TO THE ISSUE OF PREJUDICE. FIRST OF ALL,
12 MANY COURTS IN THIS DISTRICT REQUIRE NO SHOWING OF PREJUDICE AS
13 A CONDITION TO STRIKING AN EXPERT'S REPORT THAT DISCLOSES NEW
14 THEORIES IN A PATENT CASE, AND I THINK WHAT JUDGE TIGAR WROTE
15 IN THE ADOBE CASE THAT'S CITED IN OUR BRIEF IS INSTRUCTIVE
16 HERE. HE WROTE, "THIS COURT DECLINES TO REQUIRE A SHOWING OF
17 PREJUDICE IN THE CONTEXT OF MOTIONS TO STRIKE EVIDENCE BASED ON
18 A FAILURE TO COMPLY WITH THE PATENT LOCAL RULE BECAUSE
19 PREJUDICE IS INHERENT IN THE ASSERTION OF A NEW THEORY AFTER
20 DISCOVERY HAS CLOSED AND BECAUSE TO IMPOSE SUCH A BURDEN WOULD
21 CREATE AN INCENTIVE FOR LATE DISCLOSURE."

22 IN ANY EVENT, THE PREJUDICE TO THE DEFENDANTS HERE IS
23 QUITE REAL. AS WE DISCUSSED LAST WEEK IN THE CONTEXT OF
24 ADAPTIX'S MOTION TO AMEND THE INFRINGEMENT CONTENTIONS, THE
25 WHOLE POINT OF HAVING INFRINGEMENT CONTENTIONS IS TO CRYSTALIZE

1 THEORIES, ALLOW DEFENDANTS TO SHAPE THEIR DISCOVERY, SUMMARY
2 JUDGMENT, AND TRIAL PLAN.

3 AND THAT'S SOMETHING THAT'S IMPORTANT IN ALL CASES, BUT
4 IT'S ESPECIALLY SO IN CASES LIKE THIS ONE WHERE, BY COURT
5 ORDER, THE CASES ARE COORDINATED FOR PRETRIAL PURPOSES. ALL OF
6 THE DEFENDANTS HAVE TO WORK TOGETHER DURING DISCOVERY TO SERVE
7 COMMON INTERROGATORIES, APPEAR AT THE DEPOSITIONS, WORK
8 TOGETHER, AND OUR GUIDEPOST THAT WE WORK TOGETHER, OUR BIBLE,
9 IS THE INFRINGEMENT CONTENTIONS.

10 THE DEFENDANTS HAVE CRITICALLY RELIED ON THOSE CONTENTIONS
11 TO PLAN PRETRIAL STRATEGY.

12 AND WHEN WE SAW THAT REPORT, WE LOOKED AT EACH OTHER AND
13 SAID, "WHAT IS GOING ON WITH THIS REPORT? ADAPTIX IS TRYING TO
14 BAIT AND SWITCH ITS INFRINGEMENT THEORIES."

15 IN ADDITION, THE FACT OF THE MATTER IS THAT DEFENDANTS
16 WOULD HAVE PURSUED ADDITIONAL AND DIFFERENT DISCOVERY HAD THESE
17 THEORIES BEEN KNOWN FROM THE OUTSET, OR AT LEAST THE TIME THAT
18 WE GOT THE AMENDED INFRINGEMENT CONTENTIONS AT THE END OF
19 JANUARY.

20 LET ME BE MORE CONCRETE ABOUT THAT AND GIVE SOME EXAMPLES.

21 FIRST, THE DEFENDANTS WOULD HAVE PURSUED DISCOVERY OF BASE
22 STATION MANUFACTURERS, THIRD PARTIES TO THIS MATTER, REGARDING
23 THIS NEW MODE 3 THEORY THAT THE HANDSETS SELECT SOME SUBBANDS
24 AS CANDIDATE SUBCARRIERS, BUT NOT OTHER SO-CALLED NON-CANDIDATE
25 SUBCARRIERS.

1 THE COURT: AND WHAT WOULD THE BASE STATION
2 MANUFACTURERS TELL YOU THAT'S RELEVANT TO WHAT THE HANDSETS ARE
3 DOING?

4 MR. SELWYN: WELL, REMEMBER, THESE CLAIMS IN THE
5 PATENT ITSELF DESCRIBE A SYSTEM, AND THE BASE STATION IS
6 SENDING SIGNALS THAT TELL THE HANDSET WHAT TO DO AND WHICH
7 MODES TO IMPLEMENT, HOW TO IMPLEMENT THEM.

8 A SIGNIFICANT PART OF THIS CASE RELATES TO THE OPERATION
9 OF THOSE BASE STATIONS, THE OPERATION OF THE CARRIER. THE
10 HANDSET IS ONLY HALF OF THE STORY HERE AND THE INFORMATION
11 ABOUT THE OPERATION OF THE BASE STATIONS IS HELD CHIEFLY BY
12 THIRD PARTIES WHO MANUFACTURE THOSE BASE STATIONS.

13 WE WOULD HAVE ALSO SOUGHT DISCOVERY RELEVANT TO THE
14 DESIRED FOR USE LIMITATION THAT'S PRESENT IN ALL OF THE
15 ASSERTED CLAIMS, BUT NONE OF THE ASSERTED METHOD CLAIMS.

16 AND THE SUGGESTION THAT ADAPTIX MAKES THAT THESE CLAIMS
17 ARE REALLY ALL THE SAME, THAT'S JUST NOT THE CASE. THEY ARE
18 DIFFERENT CLAIMS. THEY HAVE DIFFERENT LIMITATIONS. THE
19 DESIRED FOR USE LIMITATION, WHICH IS KEY TO THE APPARATUS
20 CLAIMS, IS NOT PRESENT IN ANY OF THE METHOD CLAIMS.

21 SECOND, THROUGHOUT DISCOVERY, THE DEFENDANTS FOCUSED VERY
22 HEAVILY ON MODE 2. WHY? BECAUSE MODE 2 WAS ASSERTED FOR EVERY
23 ASSERTED INDEPENDENT CLAIM IN THIS CASE. THAT WAS THE THEORY
24 THAT WE THOUGHT ADAPTIX WAS PROCEEDING UNDER, AND WE THOUGHT
25 THAT THE THEORY WITH RESPECT TO MODE 3, BECAUSE THAT'S WHAT THE

1 INFRINGEMENT CONTENTIONS SAID, WAS SO FUNDAMENTALLY FLAWED WITH
2 THE "SELECT ALL" NOTION.

3 THIRD, WHEN WE -- THE DEFENDANTS WOULD HAVE PURSUED
4 DIFFERENT DEPOSITION TESTIMONY FROM QUALCOMM REGARDING THE
5 SOURCE CODE RELATING TO THIS NEW MODE 3 THEORY. I TOLD YOU
6 LAST WEEK ABOUT HOW APPLE HAS THE FIRMWARE. THERE'S ANOTHER
7 SET OF CODE THAT APPLE AND THE OTHER DEFENDANTS DON'T HAVE THAT
8 QUALCOMM DOES HAVE, THAT QUALCOMM ITSELF PRODUCED, THE HTL
9 CODE. WE WOULD HAVE SOUGHT DISCOVERY REGARDING THAT AT THE
10 DEPOSITIONS.

11 SO THE PREJUDICE TO US, WE THINK, IS CONCRETE AND CLEAR,
12 ALTHOUGH NO SHOWING OF PREJUDICE SHOULD BE REQUIRED.

13 THE COURT: MAY I ALSO ASK, IS THE EXPERT STILL
14 OPINING THAT THE APPARATUS CLAIMS ARE INFRINGED BY MODE 2?

15 MR. SELWYN: THAT'S A VERY GOOD QUESTION.

16 THERE IS AN INCORPORATION BY REFERENCE IN THE REPORT TO
17 THE INFRINGEMENT CONTENTIONS. WE THINK THAT'S IMPROPER AS SET
18 FORTH IN OUR LETTER BRIEF, AND I WILL ADDRESS THAT BRIEFLY IN A
19 MOMENT.

20 TO THE EXTENT THAT INCORPORATION BY REFERENCE IS ALLOWED,
21 THEN, YES, THAT WOULD BE PART OF HIS THEORY.

22 IT ALSO APPEARS TO US THAT ADAPTIX'S POSITION IS THAT EVEN
23 ABSENT THAT INCORPORATION BY REFERENCE, ITS EXPERT IS STILL
24 PURSUING A MODE 2 THEORY, THAT THERE'S ENOUGH IN THAT REPORT SO
25 THAT THE EXPERT CAN PROCEED ON THE BASIS OF MODE 2 AS SET FORTH

1 IN ITS INFRINGEMENT CONTENTIONS.

2 SO --

3 THE COURT: GO AHEAD. I'M SORRY.

4 MR. SELWYN: MY APOLOGIES.

5 SO LET ME JUST FINISH BY TURNING TO THE ISSUE OF ADAPTIX'S
6 ATTEMPT TO INCORPORATE THE INFRINGEMENT CONTENTIONS IN ITS
7 EXPERT REPORT.

8 THE PURPOSE OF AN EXPERT REPORT IS TO SET FORTH IN DETAIL
9 INFRINGEMENT OPINIONS THAT THE EXPERT WILL OFFER AT TRIAL,
10 TOGETHER WITH SUPPORTING EVIDENCE.

11 INFRINGEMENT CONTENTIONS, AS WE'VE DISCUSSED, SERVE A
12 RELATED BUT DISTINCT PURPOSE, WHICH IS TO PUT DEFENDANTS ON
13 NOTICE EARLY IN THE CASE OF THE THEORIES THAT MAY BE PURSUED.
14 IN OTHER WORDS, THE EXPERT REPORT SHOULD BE A WELL DEFINED
15 SUBSET OF WHAT'S IN CONTENTIONS.

16 ADAPTIX'S ARGUMENT THAT THE EXPERT COULD HAVE COPIED THE
17 CONTENTIONS INTO THE REPORT MISSES THE POINT AND REALLY INVERTS
18 THE RELATIONSHIP BETWEEN THE CONTENTIONS ON THE ONE HAND AND
19 THE REPORT ON THE OTHER HAND.

20 THE CASE WE CITE IN OUR BRIEF THAT STRUCK AN ATTEMPT TO
21 INCORPORATE BY REFERENCE, IT'S INTERESTING WHAT THE JUDGE SAID.
22 THAT WAS A CASE WHERE THE EXPERT REPORT SAID "I INCORPORATE BY
23 REFERENCE ALL OF THE INTERROGATORY RESPONSES," AND THE JUDGE
24 SAID, "WELL, WAIT A SECOND. INTERROGATORY RESPONSES ARE
25 SOMETHING THAT THE ATTORNEYS PREPARE WITH THE CLIENTS AND ARE

1 SIGNED BY THE CLIENT. THEY'RE NOT SIGNED BY THE EXPERT. YOU
2 CAN'T JUST DO A WHOLESALE INCORPORATION," AND IT WAS STRUCK.

3 SO, TOO, HERE. THE INFRINGEMENT CONTENTIONS ARE PREPARED
4 BY THE LAWYERS. THEY'RE NOT SIGNED BY THE EXPERT. THEY'RE NOT
5 SIGNED BY THE COMPANY.

6 THE INFRINGEMENT CONTENTIONS ARE INCONSISTENT IN ADDITION
7 HERE WITH THE REPORT IN MANY WAYS, AND THAT'S NOT SOMETHING, AS
8 ADAPTIX SUGGESTS, THAT CAN JUST BE SORTED OUT AT TRIAL, WE CAN
9 CROSS-EXAMINE BASED ON THOSE INCONSISTENCIES.

10 THAT WOULD REQUIRE AN EXPLANATION TO THE JURY ABOUT WHAT
11 INFRINGEMENT CONTENTIONS ARE ALL ABOUT. THAT WOULD BE AN AWFUL
12 MESS TO HAVE TO EXPLAIN THE PATENT LOCAL RULES AND HOW THE
13 INFRINGEMENT CONTENTIONS FIT INTO THAT.

14 AND OUR BRIEF GIVES A NUMBER OF OTHER EXAMPLES, WHICH I
15 WON'T RECITE, ABOUT THE --

16 THE COURT: WELL, AMONG OTHER THINGS, RIGHT, THE
17 INFRINGEMENT CONTENTIONS, IN TERMS OF INDIRECT INFRINGEMENT,
18 SPEAK SPECIFICALLY OF INDUCEMENT?

19 MR. SELWYN: THEY DO. THEY ASSERT --

20 THE COURT: AND THE EXPERT REPORT, I BELIEVE, AS I
21 UNDERSTAND IT, SPEAKS SPECIFICALLY TO CONTRIBUTORY
22 INFRINGEMENT.

23 MR. SELWYN: THAT'S CORRECT. THAT'S CORRECT.

24 THE INFRINGEMENT CONTENTIONS ASSERT ADDITIONAL CLAIMS THAT
25 AREN'T IN THE EXPERT REPORT. THERE ARE A NUMBER OF OTHER

1 DIFFERENCES.

2 AND LET ME JUST CLOSE WITH ONE FINAL DIFFERENCE, WHICH IS
3 ADAPTIX ARGUES IN A FOOTNOTE IN ITS LETTER BRIEF THAT IT STILL
4 ALLEGES INFRINGEMENT OF MODE 2.

5 AS FAR AS WE CAN TELL, THE BASIS FOR THAT IS ONE SENTENCE
6 IN THE EXPERT REPORT INCORPORATING BY REFERENCE THE
7 INFRINGEMENT CONTENTIONS.

8 YOUR HONOR WILL SEARCH IN VAIN FOR ANY MENTION OF MODE 2
9 ANYWHERE IN THE PORTION OF THE EXPERT'S REPORT THAT GOES
10 CLAIM-BY-CLAIM WITH THE INFRINGEMENT ANALYSIS. THAT ANALYSIS
11 BEGINS AROUND PAGE 67 OF THE REPORT. YOUR HONOR CAN LOOK AT
12 IT. ADAPTIX CAN'T POINT YOU TO ANY PAGE WITHIN THAT
13 CLAIM-BY-CLAIM INFRINGEMENT ANALYSIS THAT EVEN USES THE WORD
14 MODE 2.

15 SO, YOUR HONOR, RESPECTFULLY, WE'RE AT A STAGE NOW WHERE
16 THE CASE SHOULD BE NARROWED. THERE ARE STILL 14 CLAIMS THAT
17 ARE ASSERTED, FAR MORE THAN CAN ACTUALLY BE TRIED, AND TO
18 INTRODUCE -- FOR ADAPTIX TO TRY TO INTRODUCE, THROUGH ITS
19 EXPERT, AT THIS STAGE FUNDAMENTALLY DIFFERENT AND FUNDAMENTALLY
20 NEW THEORIES, EVEN BY ADAPTIX'S ADMISSION, SIGNIFICANTLY
21 PREJUDICES THE DEFENDANTS.

22 THE FIRST STEP IN THE DIRECTION OF NARROWING THIS CASE IS
23 TO STRIKE THESE TWO NEW THEORIES, HOLD ADAPTIX TO WHAT IS IN
24 ITS INFRINGEMENT CONTENTIONS, AND LIMIT ADAPTIX'S EXPERT TO
25 WHAT HAS BEEN DISCLOSED AND WHAT WE HAVE BEEN PROCEEDING ON

1 THROUGHOUT THIS CASE.

2 THE COURT: THANK YOU, MR. SELWYN.

3 MR. LIN, WILL YOU OR ONE OF YOUR COLLEAGUES BE PRESENTING
4 THE ARGUMENTS THIS MORNING?

5 MR. LIN: ONE OF MY COLLEAGUES ON THE TELEPHONE.

6 THE COURT: ALL RIGHT. THANK YOU.

7 MR. FOSTER, MR. ERCOLINI, WHO'S GOING TO SPEAK TO THESE
8 ISSUES?

9 MR. FOSTER: JAMES FOSTER, YOUR HONOR.

10 THE COURT: GO AHEAD, MR. FOSTER. IF YOU WOULD, SIR,
11 I'M HAVING A BIT OF TROUBLE HEARING YOU IN THE COURT, SO IF YOU
12 COULD KEEP YOUR VOICE UP, I SURE WOULD APPRECIATE IT.

13 MR. FOSTER: CAN YOU HEAR ME NOW?

14 THE COURT: I CAN. GO AHEAD.

15 MR. FOSTER: THANK YOU, YOUR HONOR.

16 FIRST OF ALL, BY WAY OF INTRODUCTION, I ONLY ENTERED MY
17 APPEARANCE IN THIS CASE SEVERAL DAYS AGO, SO I WASN'T INVOLVED
18 IN THE EARLY STAGES, AND IN PREPARING TO ARGUE THIS MOTION, I
19 ATTEMPTED TO EDUCATE MYSELF BY READING AT LEAST HALF A DOZEN
20 OPINIONS THAT YOU'VE WRITTEN ON MOTIONS SUCH AS THIS, MOTIONS
21 TO STRIKE AND MOTIONS TO ENFORCE THE LOCAL RULES, AND OF COURSE
22 I'M IMPRESSED WITH THE QUALITY OF YOUR INTELLECT.

23 AND I THINK I GOT IT. I THINK BY READING, I CAN
24 UNDERSTAND WHAT IT IS YOU'RE TRYING TO DO IN ENFORCING LOCAL
25 RULES AND VARIOUS PROVISIONS.

1 AND I ALSO AM IMPRESSED WITH THE ARGUMENTS THAT COUNSEL
2 GAVE YOU.

3 BUT LET'S TAKE A LOOK AT THIS PARTICULAR SITUATION. IN
4 JANUARY OR FEBRUARY, THERE WILL BE A TRIAL IN FRONT OF A JURY
5 WHERE THE JURY WILL HEAR IN GREAT DETAIL THE PROVISIONS OF
6 WHAT'S -- WHAT WE UNDERSTAND TO BE MODE 3 AND HOW THE PRODUCTS
7 OF DEFENDANTS COMPARE TO MODE 3. THEY WILL HEAR THAT, I THINK
8 WE ALL AGREE, IN CONNECTION WITH THE METHOD CLAIMS.

9 SO THE ISSUE BEFORE YOUR HONOR IS, SHOULD THEY BE ASKED,
10 AT THE CLOSE OF THE TESTIMONY, WHETHER THE APPARATUS CLAIMS ARE
11 INFRINGED AS WELL, OR SHOULD THOSE ISSUES HAVE TO BE HELD OVER
12 FOR A NEW TRIAL IN ANOTHER LAWSUIT?

13 IN THIS PARTICULAR CASE, THE APPARATUS CLAIMS CORRESPOND
14 TO METHOD CLAIMS, AS WE SAID IN OUR LETTER BRIEF. THE JURY
15 WILL HEAR ALL THAT INFORMATION.

16 WE HAVE NOT ADDED PRODUCTS TO THE CASE OR ADDED ANY, ANY
17 DIFFERENT TECHNOLOGY.

18 APPARENTLY THE PROBLEM IS -- AND I CONFESS, I WISH I
19 DIDN'T HAVE TO DEAL WITH IT -- THAT IN THE CONTENTIONS THAT
20 WERE SUBMITTED IN FEBRUARY, SOMEONE SHOULD HAVE AT LEAST PUT A
21 FOOTNOTE SAYING NOT JUST MODE 2, BUT ALSO MODE 3, OR PERHAPS
22 MORE.

23 THE QUESTION YOUR HONOR HAS TO DECIDE IS, DOES THAT MEAN
24 THE JURY CANNOT HEAR THIS? THE TRIAL IS FIVE OR SIX MONTHS
25 FROM NOW, AND THERE ARE CERTAINLY PLENTY OF LAWYERS ON THE

1 DEFENDANTS' SIDE TO BE ABLE TO DEAL WITH IT.

2 I THINK IF YOUR HONOR RULES IT OUT, THAT CERTAINLY IS
3 WITHIN YOUR RIGHT TO DO SO. THERE SHOULD HAVE BEEN A FOOTNOTE
4 OR SOMETHING MORE THAN THAT IN THE CONTENTIONS FOUR OR FIVE
5 MONTHS AGO.

6 AND SINCE I'M AN ADVOCATE, YOU CAN DISCOUNT ANYTHING I
7 SAY. BUT I HAVE TO SAY THAT NEUTRAL OBSERVERS TO THE PROCESS
8 ARE GOING TO WONDER WHY THE JURY SHOULD NOT HAVE THE
9 OPPORTUNITY TO ASK THAT QUESTION. WOULDN'T IT MAKE A LOT OF
10 SENSE TO DO THAT, AND ISN'T THIS SITUATION WHERE THE NEED TO
11 ENFORCE THE PROVISIONS OF THE LOCAL RULES THAT THE DEFENDANTS
12 ARE RELYING UPON AND ASKED TO BE IMPOSED ORIGINALLY?

13 IF YOU SO DECIDE, OF COURSE WE'LL RESPECT THAT.

14 BUT I THINK IN THIS PARTICULAR CASE, NO AMOUNT OF
15 EFFICIENCY WOULD BE AFFECTED IF A JURY COULD ANSWER THAT
16 ADDITIONAL QUESTION WITH RESPECT TO THE APPARATUS CLAIMS.

17 THE COURT: MR. FOSTER, IF I CAN INTERRUPT YOU THERE
18 FOR JUST A MOMENT? I WANT TO JUST GET YOUR REACTION TO ONE
19 ISSUE, OR POINT, THAT MR. SELWYN RAISED, WHICH IS THAT THE
20 APPARATUS CLAIMS, IN FACT, ARE MARKEDLY DISTINCT FROM THE
21 METHOD CLAIMS, AT LEAST IN ONE OR TWO WAYS.

22 WOULD YOU TAKE ISSUE WITH THAT? WOULD YOU ARGUE THAT, IN
23 FACT, THEY ARE ALL -- THEY ARE ENTIRELY OVERLAPPING BUT FOR THE
24 USE OF THE SUBSCRIBER UNIT IN THE APPARATUS CLAIM?

25 MR. FOSTER: LET ME SAY TWO THINGS, YOUR HONOR.

1 FIRST, I DIDN'T SEE HIM MAKE THAT POINT IN THE LETTER
2 BRIEF, SO I'M NOT AS PREPARED AS I WOULD PREFER TO BE HAD HE
3 ACTUALLY OUTLINED THAT IN HIS BRIEF.

4 BUT WHAT I DEFINITELY WANT TO SAY IS THAT COUNSEL HERE
5 HAVE BEEN ALL OVER THESE CLAIMS AND THIS CASE HAS BEEN AROUND
6 FOR A WHILE AND A LOT OF TIME HAS BEEN SPENT ON THE CASE.

7 TO THE EXTENT THAT THERE MAY BE DIFFERENCES BETWEEN THE
8 APPARATUS CLAIMS AND THE METHOD CLAIMS, THAT'S THE KIND OF
9 THING THAT I THINK THAT THEY SHOULD BE EASILY PREPARED TO DEAL
10 WITH.

11 THE COURT: ALL RIGHT. I INTERRUPTED YOU,
12 MR. FOSTER. GO AHEAD.

13 MR. FOSTER: MY UNDERSTANDING OF THE DIFFERENCE IS --
14 IT MAY BE INCOMPLETE -- BUT I THINK THOSE ARE DIFFERENCES IN
15 LEGAL THEORIES AND NOT DIFFERENCES IN HOW THE FACTS APPLY TO
16 THEM.

17 BUT, AGAIN, THE ISSUE WASN'T DEVELOPED IN THE LETTER BRIEF
18 AND I CAN'T RESPOND IN DETAIL ON THAT.

19 UNLESS YOUR HONOR HAS QUESTIONS, I'M GOING TO MOVE TO
20 ARGUMENT TWO.

21 THE COURT: GO AHEAD.

22 MR. FOSTER: ALL RIGHT.

23 ARGUMENT TWO, AGAIN, THE WAY I PREPARED FOR THIS -- AND I
24 WASN'T AROUND AT THE TIME -- BUT I READ THE MARKMAN HEARING
25 THAT YOUR HONOR CONDUCTED IN DECEMBER OF 2013 AND THE WAY I

1 UNDERSTAND THE ARGUMENT TO GO BETWEEN COUNSEL, AND YOUR HONOR
2 WAS VERY, VERY ENGAGED IN IT, COLUMN 3 OF THE '784 PATENT
3 DESCRIBES VARIOUS EMBODIMENTS OF THE INVENTION. THERE'S NO
4 REAL FACTUAL DISPUTE AS TO HOW DEFENDANTS' PRODUCTS OPERATE AND
5 HOW VARIOUS MODES IN THE STANDARD TO OPERATE, AND WHAT HAPPENS
6 IS THAT THE HANDSET, THE U.E.S., THEY DEVELOP AND REPORT ON ALL
7 OF THE SUBBANDS AND PROVIDE CERTAIN CQI OR OTHER TECHNICAL
8 FEEDBACK WITH RESPECT TO THE SUBBANDS, AT LEAST IN MODE 3.

9 AND SO THE LIVELY ARGUMENT AT THE MARKMAN HEARING IS,
10 WELL, DO THE CLAIMS COVER THAT? AND THEN THE ARGUMENT FOCUSED
11 ON THE LANGUAGE LOOKING AT THE SUBBANDS, AND AS I RECALL, YOUR
12 HONOR WAS VERY VIGOROUS IN SAYING, WELL, LOOK, THERE IS THIS
13 EMBODIMENT IN CLAIM 3 WHERE THEY DO REPORT EVERYTHING AND WHY
14 DOESN'T THE CLAIM COVER THAT, ET CETERA, ET CETERA.

15 SO THE PARTIES ADDRESSED THAT ISSUE, AND THE POSITION THAT
16 WE TOOK THEN, AND WE STILL TAKE IN OUR CONTENTIONS, IS THAT YOU
17 HAVE THE "SELECT ALL" OPTION. IF YOU'RE SELECTING ALL, YOU ARE
18 STILL SELECTING, AT LEAST IF YOU'RE, IF YOU'RE PROVIDING
19 FEEDBACK WHICH DIFFERENTIATES BETWEEN THE CARRIERS.

20 NOW, IN -- RECENTLY, AS WE APPROACH TRIAL AND APPROACH THE
21 SITUATION WHERE DISPOSITIVE MOTIONS ARE GOING TO BE FILED, WE
22 ANTICIPATED THAT DEFENDANTS WILL TAKE THE POSITION AND THEY
23 WILL HAVE THEIR EXPERT ISSUE A REPORT IN A COUPLE WEEKS SAYING
24 THAT THEY THINK THE CLAIMS SHOULD BE, SHOULD BE CONSTRUED OR
25 INTERPRETED OR VIEWED AS NOT ALLOWING THE "SELECT ALL" OPTION,

1 AND THEREFORE, IF YOU REPORT ON -- IF YOU REPORT INFORMATION ON
2 ALL OF THE SUBBANDS, YOU'RE NOT WITHIN THE TERMS OF THE CLAIM.

3 SO I LOOKED AT YOUR HONOR'S CLAIM CONSTRUCTION, AND AS WE
4 SAID IN OUR LETTER BRIEF, WE DON'T -- THIS IS NOT AT ALL
5 CRITICAL. WE DO NOT SEE ANYTHING IN THE CLAIM CONSTRUCTION
6 THAT WOULD PRESENT -- PREVENT DEFENDANTS FROM MAKING THAT
7 ARGUMENT IN THEIR EXPERT REPORT AND IN THEIR DISCLOSED MODE, OR
8 EVEN AT TRIAL.

9 SO THE ISSUE WE HAD TO DEAL WITH IS, WELL, IF THEY'RE
10 GOING TO TAKE THAT POSITION AND IF THE COURT MOVES IN THAT
11 DIRECTION, DO WE HAVE A BACKUP THEORY?

12 AND THE BACKUP THEORY IS WHAT YOU SEE IN THE EXPERT'S
13 REPORT. WE DON'T NEED THAT IF THE CONSTRUCTION IS, OR THE
14 THEORY IS THAT THE "SELECT ALL" OPTION -- THE CLAIM COVERS THE
15 "SELECT ALL" OPTION.

16 IF YOUR HONOR RULES FROM WHAT HAPPENED, WHAT WE'VE DONE SO
17 FAR AND RULES OUT THAT THEORY, THEN I THINK WE SHOULD BE ABLE
18 TO DO THE FALBACK ARGUMENT.

19 THE REASON IT'S IN THE EXPERT REPORT NOW IS THAT WE DIDN'T
20 WANT TO WAIT TO SEE WHAT THEIR EXPERT HAD TO SAY AND THEN HAVE
21 TO TRY TO DO A REBUTTAL TO A REBUTTAL REPORT. WE THOUGHT WE'D
22 GET IT IN EARLY, AND WE'LL OBVIOUSLY STIR THE POT BY DOING IT,
23 BUT HERE WE ARE.

24 THE FINAL COMMENT I WOULD MAKE AS I LOOK AT -- AS I LOOK
25 AT WHAT YOU SEE IN THE EXPERT REPORT, AT THE MARKMAN HEARING,

1 THERE WAS DISCUSSION ABOUT WHETHER COLUMN 3 OF THE CLAIM WOULD
2 COVER REPORTING ON ALL OF THE MODES AND THEN ORDERING THEM, SO
3 WHAT DR. CALOYANNIDES IS SAYING IN HIS EXPERT REPORT IS THIS IS
4 HOW THE ORDERING IS DONE, AND IT GIVES YOU DETAILS ON THAT.

5 SO THERE YOU HAVE IT.

6 THE COURT: MR. FOSTER, ONE QUESTION I HAVE ABOUT
7 THIS WHAT I'LL CALL ANTICIPATORY THEORY THAT YOUR EXPERT OFFERS
8 IN HIS REPORT, IT SEEMS TO ME THAT, AT THIS STAGE ANYWAY, THE
9 COURT HAS TO PRESUME THAT THE CONSTRUCTION THAT I ISSUED BACK
10 IN DECEMBER IS THE CONSTRUCTION THAT WILL APPLY THROUGHOUT THE
11 REMAINDER OF THIS CASE, INCLUDING AT TRIAL.

12 I ALSO HAVE TO KEEP IN MIND, I THINK, THAT THIS WAS A
13 CONSTRUCTION, I BELIEVE, THAT ONE OF YOUR COLLEAGUES URGED ME
14 TO ADOPT.

15 SO WITH THAT HISTORY IN MIND, WOULD YOU AT LEAST CONCEDE
16 THAT THIS ANTICIPATORY THEORY THAT YOUR EXPERT IS OFFERING IS
17 INCONSISTENT WITH THE CONTENTIONS THAT WERE DISCLOSED, OR
18 SERVED, WHICH MADE NO MENTION OF ANY SUCH INTERPRETATION?

19 MR. FOSTER: I WILL READILY CONCEDE THAT, YOUR HONOR.
20 AND IF YOU'LL ALLOW ME TO MAKE ONE STATEMENT?

21 THE COURT: GO AHEAD.

22 MR. FOSTER: I THINK IT WAS IN OUR LETTER BRIEF. IT
23 INVOLVED A LOT OF CASES AND WHAT HAPPENED IN THEM. I MEAN,
24 SOME JUDGES DO EARLY MARKMANS, SOME DO LATE MARKMANS, AND THOSE
25 WHO DO EARLY MARKMANS END UP ADDING NUANCE AS THE CASE GOES ON,

1 AND SOMETIMES THE NUANCE COMES IN RESPONSE TO MOTIONS,
2 DISPOSITIVE MOTIONS.

3 I KNOW HERE WHEN YOU ISSUED YOUR CLAIM CONSTRUCTION, YOU
4 MORE THAN HAD -- SAYING THAT IF THERE WERE DISPOSITIVE MOTIONS
5 LATER, YOU WOULD GO INTO MORE DETAIL THAN YOU DID IN YOUR
6 MARKMAN SITUATION.

7 SO AS LONG AS -- AS LONG AS WE CAN CONTINUE TO ARGUE --
8 AND IF THE COURT DOES NOT ALLOW OUR THEORY THAT SELECTING --
9 THAT THE CLAIMS INCLUDES "SELECTING ALL," THEN WE DO NOT NEED
10 THE ADDITIONAL THEORY, OR THE BACKUP THEORY.

11 THE COURT: ALL RIGHT. I THINK I UNDERSTAND YOUR
12 POSITION, MR. FOSTER. ANY OTHER POINT YOU WISH TO RAISE, SIR?

13 MR. FOSTER: ON THAT POINT, NO.

14 ON THE THIRD POINT, WHICH HAD TO DO WITH THE, THE
15 INFRINGEMENT CONTENTIONS, FOR BETTER OR FOR WORSE, THE WAY THE
16 RULES ARE SET UP, IN YOUR COURT AND IN A LOT OF OTHER COURTS,
17 IS THAT YOU CANNOT ADD THINGS AS YOU GO ALONG AS WE'RE NOW --
18 AS WE'VE BEEN DISCUSSING FOR A WHILE NOW, BUT YOU CAN ALWAYS
19 DROP THINGS.

20 AND SO THE TENDENCY AMONG PARTIES IS TO, WHENEVER THEY
21 HAVE SOMETHING NEW, TO INCLUDE EVERYTHING AND PUT OFF UNTIL --
22 THAT THEY'VE ALREADY DONE OR THAT THEY COULD DO AND THEN PUT
23 OFF TO A LATER DATE DROPPING THINGS AS THEY APPROACH TRIAL, AND
24 IN DR. CALOYANNIDES'S REPORT, HE INCLUDED THE INFRINGEMENT
25 CONTENTIONS SO AS NOT TO WAIVE ANY OF THOSE THEORIES, AND IN

1 OUR LETTER BRIEF, WE RESPONDED BY SAYING, OKAY, WE HAVE DROPPED
2 PARTS OF OUR CASE AND OTHERS WE'VE DROPPED CERTAIN CLAIMS AND
3 DROPPED CERTAIN THEORIES AND THE COURT HAS ORDERED OUT THE
4 CONTRIBUTORY INFRINGEMENT THEORY.

5 SO YOU NO LONGER HAVE TO DEAL WITH THOSE THINGS.

6 BUT WE CONTINUE TO ASSERT ALL OF THOSE THEORIES WHICH HAVE
7 NOT BEEN DROPPED, AND I HAVE NOT SEEN ANYTHING, FROM THIS COURT
8 OR ELSEWHERE, WHICH SAYS THAT'S AN IMPROPER WAY TO PROCEED, SO
9 WE'D OBVIOUSLY BE VERY MUCH PREJUDICED IF WE WERE NOT PERMITTED
10 TO DO THAT AND HAD TO GO DOWN SOME OTHER ROUTE.

11 THE COURT: ALL RIGHT, MR. FOSTER. I THINK I HAVE
12 IT. ANY OTHER POINTS YOU WISH TO RAISE ON ANY OF THE THREE
13 ISSUES THAT YOU'VE IDENTIFIED?

14 MR. FOSTER: THAT'S IT, YOUR HONOR.

15 THE COURT: THANK YOU, MR. FOSTER.

16 MR. SELWYN, I'LL GIVE YOU A BRIEF REBUTTAL IF YOU WOULD
17 LIKE IT.

18 MR. SELWYN: YES. JUST VERY BRIEFLY, ONE POINT IN
19 REBUTTAL, WHICH IS THAT THE DEFENDANTS ARE NOT ASKING HERE FOR
20 AN UNFAIR OR AN UNUSUAL RESULT. CASE AFTER CASE IS CLEAR THAT
21 NEW THEORIES MAY NOT BE INTRODUCED THROUGH AN EXPERT REPORT,
22 AND YOU'VE JUST HEARD AGAIN AN ADMISSION THAT THESE ARE TWO NEW
23 THEORIES, THE FIRST NEW THEORY ABOUT THE ASSERTION OF MODE 3
24 AGAINST THE APPARATUS CLAIMS, THE SECOND NEW THEORY THE NEW
25 FLAVOR, THE SELECTING SOME SUBBANDS AS SATISFYING THE

1 "SELECTING" TERM FOR MODE 3. TWO INDISPUTABLY NEW THEORIES.

2 WE'RE NOT ASKING FOR AN UNUSUAL OR UNFAIR RESULT.

3 WE ARE DEALING HERE WITH A PLAINTIFF THAT IS VERY
4 SOPHISTICATED. IT'S AN ACACIA ENTITY. THEY HAVE BROUGHT 50
5 CASES IN THE FEDERAL COURTS. THEY SHOULD BE HELD TO THE SAME
6 STANDARDS OF FOLLOWING THE PATENT LOCAL RULES AS ANYBODY ELSE.

7 THANK YOU.

8 THE COURT: ALL RIGHT. I THINK I HAVE THE ISSUES,
9 COUNSEL. THANK YOU.

10 I'M GOING TO TAKE THIS MATTER UNDER SUBMISSION. I WANT TO
11 GIVE JUST SOME FURTHER THOUGHTS TO THE POINTS THAT WERE RAISED
12 IN ORAL ARGUMENT THIS MORNING.

13 I'LL GET AN ORDER OUT QUICKLY. THIS WILL NOT BE A THESIS.
14 IT'LL BE MUCH MORE OF A SUMMARY. BUT I DO WANT TO GIVE A FEW
15 FURTHER THOUGHTS TO THIS BEFORE I FORMALLY RULE.

16 ARE THERE ANY OTHER ISSUES THAT I CAN HELP YOU WITH THIS
17 MORNING WHILE WE'RE ALL HERE TOGETHER? ANYTHING AT ALL? I'M
18 NOT LOOKING FOR WORK, BUT I'LL TAKE IT UP.

19 IF NOT, I'LL WISH YOU ALL A GOOD AFTERNOON.

20 MR. SELWYN: THANK YOU, YOUR HONOR.

21 MR. FOSTER: THANK YOU, YOUR HONOR.

22 (THE PROCEEDINGS WERE CONCLUDED AT 11:00 A.M.)

23

24

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1
2
3 CERTIFICATE OF REPORTER
4
5
6

7 I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED
8 STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
9 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
10 CERTIFY:

11 THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
12 A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
13 ABOVE-ENTITLED MATTER.

14
15 *Lee-Anne Shortridge*
16

17 LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595
18 DATED: AUGUST 12, 2014
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